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REMARKS

Upon election and entry of the Amendments provided herein, claims 1, 2, and 5-11 are pending in this case, claims 15-22 are sought to be canceled and claims 3-4, 12-14 and 23-34 are withdrawn. Applicants reserve the right to pursue withdrawn or canceled claims at a later date. In view of the requirement to restrict the above-referenced application, Applicants hereby provisionally elect to prosecute the invention of Group I, represented by claims 1, 2, 5 - 11, 15 - 22, and elect the nucleotide sequence represented by SEQ ID NO: 5. No species is provisionally elected because the species election is moot in view of the claim Amendments.

This provisional election is made with traverse and without prejudice to or disclaimer of the other claims or inventions disclosed.

Applicants respectfully traverse the restriction requirement as it applies to Groups I - VII. It is the Examiner's position that the products and methods of Groups I - VII are patently independent and distinct inventions. However, even where a single application contains independent and distinct inventions, restriction remains improper unless the examiner can show that search and examination of all groups together would entail a "serious burden". See MPEP 803. In the present situation, the Examiner has clearly failed to make such a showing. Furthermore, the Applicants take the position that restriction is improper and examination of all groups together is not overly burdensome.

The Applicants respectfully submit the distinctions between Groups I - VII are improperly drawn. Referring to Groups III- VII in the Office Action, page 4, lines 5 - 7, the Examiner states, "The groups have acquired separate status in the art and separate fields of search as further evidenced by their separate classification". However, Groups III - VII, and in fact I - VII, are not of different classification, they only distinguished by subclass. All the Groups defined by the Office Action belong to the same class 435. Therefore the search and examination of all the Groups together would not entail a serious burden. Groups I - VII should not be restricted, either because they have not acquire separate field of search or because they are similar enough to so as not to pose a serious burden in examination.

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Applicants submit the search and examination of the entire application can be made without serious burden. The search of the claims required for any one the groups specified by the Examiner in the restriction would be useful for examining the claims of the other groups. Identical sequences are recited in all groups. Furthermore, many of the aspects described by one claim are required for the practice of other claims. For example, a transformed host with the specification described in claim 18 (in Group I) is required for the practice of claim 23 (in Group III). Also, the practice of claim 31 (in Group VI) requires an amino acid sequence described by claim 4 (in Group II).

Election of a single sequence

The Applicants respectfully note that the Examiner has classified SEQ ID NOs: 24 and 25 as polynucleotide sequences; however, SEQ ID NOs: 24 and 25 are polypeptide sequences.

The Examiner required the election of a single sequence. The Examiner maintains that "nucleotide and polypeptide sequence are structurally distinct chemical compounds and are unrelated to one another." However, the polynucleotides and polypeptides are related and therefore do not represent an undue burden for searching and examination. The claimed sequences are related as they are various breve genes and peptides, signal sequences and processed peptides and their corresponding nucleic acid sequences. A search of any one sequence may in fact cross reference many of the other claims sequences, therefore the Applicant submits it would be improper to restrict. Also, the Applicants state even if the Examiner disagrees that the sequences are related it would not be an undue burden to search and examine all the sequences together.

Furthermore, the majority of the claimed sequences are claimed in the Markush format, see claim 11 for example. According to MPEP 803.02:

If the members of the Markush group are sufficiently few in number or so closely related that a search and examination of the entire claim can be made without serious burden, the examiner must examine all the members of the Markush group in the claim on the merits, even though they are directed to independent and distinct inventions. In such a case,

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the examiner will not follow the procedure described below and will not require restriction.

The sequences are indeed closely related and few in number, therefore a restriction of the sequence that belong to Markush claims is not proper.

Still further, the Applicants point out that the Commissioner in the interest of promoting biotechnology has partially waived 37 C.F.R. § 1.141 *et seq.* to allow a reasonable number of sequences to be examined. Although the Applicants believe twelve to be a reasonable number, if the Examiner believes ten is more reasonable, the Applicants select SEQ ID NOs: 1, 3, 5, 15, 26, 27, 28, 30, 32, 34, 36, and 38.


CONCLUSION

Applicants provisionally elects to prosecute the invention of Group I, represented by claims 1, 2, 5 – 11, 15 – 22, SEQ ID NO: 5.

In the event that the restriction requirement is maintained in this application and nonelected process claims are withdrawn from consideration, Applicants request treatment of nonelected process claims as set forth in Official Gazette dated March 26, 1996 (1184 O.G. 86). Upon a determination that a product claim is allowable, Applicants request rejoinder of nonelected process claims and examination of such claims on the merits in the above-referenced application.

Applicants believe that a full and complete reply has been made to the outstanding Office communication and, as such, the present application is in condition for allowance. If the Examiner believes, for any reason, that personal communication will expedite prosecution of this application, the Examiner is invited to telephone the undersigned at the number provided.

Respectfully submitted,


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